IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RAYMOND DEAN CRUM JR.,
Petitioner Employee,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA,
Respondent,

B.J. CECIL TRUCKING, INC.,
Respondent Employer,

WAUSAU INSURANCE CO.,
Respondent Insurer.

No. 2 CA-IC 2013-0007
Filed December 16, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Civ. App. P. 28(c).

SPECIAL ACTION – INDUSTRIAL COMMISSION
ICA Claim No. 20120450018
Insurer No. WC197-A29282
The Honorable Jacqueline Wohl,
Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Tretschok, McNamara & Miller, P.C., Tucson
By J. Patrick Butler
Counsel for Petitioner Employee

The Industrial Commission of Arizona, Phoenix
By Andrew F. Wade
Counsel for Respondent

Klein, Doherty, Lundmark, Barberich & LaMont, P.C., Tucson
By Eric W. Slavin
Counsel for Respondents Employer and Insurer

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Kelly and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 In this statutory special action, petitioner/employee Raymond Dean Crum Jr., challenges the portion of the administrative law judge's (ALJ) award denying his claim for permanent disability following a work-provoked seizure and his medical preclusion from returning to work as a commercial trucker. For the following reasons, we affirm the award.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the ALJ's award. *Southwest Gas Corp. v. Indus. Comm'n*, 200 Ariz. 292, ¶ 2, 25 P.3d 1164, 1166 (App. 2001). Crum was employed by respondent/employer B.J. Cecil Trucking, Inc., for nearly twenty years as a tanker truck driver. He typically worked fifteen hours a day, five days a week. One morning in

February 2011, after working over twenty-two hours, Crum suffered a seizure, and subsequently was prescribed Dilantin, an anti-seizure drug.[1] As a result, Crum lost his commercial driver license (CDL) and, consequently, his job with B.J. Cecil. [2]

¶3 After examining Crum's electrocephalography (EEG) results, Crum's neurologist determined he had an innate seizure tendency termed a "focal seizure disorder," which increased susceptibility to provoked seizures. [3] The neurologist further determined that Crum's seizure had been provoked by sleep deprivation and testified the seizure tendency predated Crum's seizure. There was no evidence that the seizure tendency itself was in any way work-related.

¶4 By January 2012, the effects of the provoked seizure were resolved and Crum was determined to be medically stable. But he was required to take anti-seizure medicine for several years, with annual examinations by his neurologist. Both Crum's

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[1] Following the seizure, but before the cause was known, Crum's board-certified neurologist had given him two options based on the single seizure episode: either forgo any driving for three months with medical observation and no antiepileptic medicine, or begin medication to resume driving. Crum chose the latter. Once neurological testing was completed and Crum's innate seizure tendency diagnosed, the doctor concluded Crum could not forgo anti-seizure medication, but would in fact be required to take it for several years.

[2] Federal regulations medical advisory criteria provide that a driver taking antiseizure medication cannot be qualified to drive a commercial vehicle. Department of Transportation's Federal Highway Administration, *Medical Advisory Criteria for Evaluation Under 49 CFR Part 391.41(b)(8)*, http://www.fmcsa.dot.gov/rules-regulations/administration/medical.htm (last visited Dec. 12, 2013) (hereinafter "Medical Advisory Criteria").

[3] Crum denies having an "underlying seizure disorder." Rather, he states that "[h]e has an abnormal EEG that indicates he is more prone to having a seizure than the general population."

neurologist and the independent medical examination (IME) neurologist advised that Crum not work any job requiring sleep deprivation.

¶5 After Crum applied for disability benefits, hearings were held and the ALJ thereafter issued a decision awarding benefits from February 24, 2011 to January 4, 2012. The ALJ determined Crum to be "stable and stationary without permanent impairment" effective January 4, 2012. Crum requested a review of the decision, and the ALJ affirmed her findings and award. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12–120.21(A)(2), 23–951(A) and Ariz. R. P. Spec. Actions 10.

Discussion

¶6 Crum argues on appeal that the ALJ erred in not finding him permanently disabled. He notes that he suffered a work-induced seizure, was prescribed anti-seizure medication, and lost his CDL and job as a result. He asserts that under federal guidelines, he must be off his anti-seizure medication for ten years in order to regain his CDL.[4] He further asserts that because of his susceptibility to seizures provoked by long work hours and sleep deprivation, he never will be able to return to commercial truck driving due to its

[4]We agree with Crum that the ALJ may have misconstrued regulatory advisory criteria by stating the waiting period for an individual with a provoked seizure applying for a variance to reacquire a CDL "appears to be closer to 6 months." That waiting period instead pertains to individuals who experienced a seizure of unknown cause, not requiring medication. *See* Medical Advisory Criteria. An individual suffering a seizure resulting from a known medical condition, *e.g.*, sleep deprivation, may be certified once recovered and not taking medication. Crum asserts that the ten year waiting period pertaining to "[d]rivers with a history of epilepsy/seizures" applies to him. However, Crum's situation, *i.e.*, a seizure tendency coupled with a single provoked seizure, does not appear to be directly addressed by the advisory criteria. In any event, the timing of his possible recertification does not alter our analysis here.

demanding work schedule. In reviewing findings and awards of the Industrial Commission, we defer to the ALJ's factual findings, but review questions of law de novo. *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, ¶ 6, 90 P.3d 211, 213 (App. 2004).

¶7 Workers' compensation benefits are provided to a person who suffers an injury "arising out of and in the course of his employment." A.R.S. § 23–1021.[5] A claimant must establish all elements of his claim. One element is that the claimant suffered an injury and that the injury was causally related to his employment. *Western Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). Where the cause or the result of an injury is not apparent to a lay person, causation must be established by expert testimony. *Id.*; *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 9, 275 P.3d 638, 642 (App. 2012).

¶8 As Crum points out, an employer takes an employee with whatever peculiar vulnerabilities to injury the individual may have. *Murphy v. Indus. Comm'n*, 160 Ariz. 482, 486, 774 P.2d 221, 225 (1989). When an industrial injury aggravates a preexisting condition such that the employee is disabled, the result is compensable. *See Tatman v. Provincial Homes*, 94 Ariz. 165, 169, 382 P.2d 573, 576 (1963); *see also Martinez v. Indus. Comm'n*, 192 Ariz. 176, ¶ 17, 962 P.2d 903, 907 (1998) ("industrial accident need not be the sole cause of an injury, so long as it is *a* cause"). More is required, however, than merely demonstrating an aggravation of a preexisting disease

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[5]Such an injury is defined in A.R.S. § 23-901(13) as:

> (a) Personal injury by accident arising out of and in the course of employment.
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> . . . .
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> (c) An occupational disease that is due to causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and not the ordinary diseases to which the general public is exposed . . . .

or condition and an inability to work. *Arellano v. Indus. Comm'n*, 25 Ariz. App. 598, 603-04, 545 P.2d 446, 451-52 (1976).

¶9 Where a preexisting condition is aggravated, the claimant must show that an industrial injury caused the aggravation and that the aggravation has not terminated. *Arellano*, 25 Ariz. App. at 603-04, 545 P.2d at 451-52. Claimant must show "that the claimed permanent disability was in fact caused, 'triggered' or contributed to by the industrial injury, and was not merely the result of the natural progression of the preexisting disease." *Id*. Where the industrial injury has resolved, and all that remains are the symptoms of the underlying condition, an ALJ properly may find no permanent disability as a result of the injury. *See, e.g*., *Arellano*, 25 Ariz. App. at 603-04, 545 P.2d at 451-52 (no permanent disability finding where work injury aggravated preexisting, but previously asymptomatic, degenerative arthritis of the spine, but continuing pain due to arthritis, not injury, which had resolved); *Lamb v. Indus. Comm'n*, 27 Ariz. App. 699, 701, 558 P.2d 727, 729 (1976) (back strain suffered on job no longer present, only symptoms of underlying preexisting degenerative disc disease, consequently no permanent disability finding).

¶10 The cases cited by Crum are not to the contrary. In those decisions, the claimant's disability was industrially-caused. In *Hunter v. Indus. Comm'n*, 130 Ariz. 59, 61, 633 P.2d 1052, 1054 (App. 1981), the petitioner developed a condition known as "meat wrapper's asthma," which both medical witnesses agreed was caused by industrial exposure to fumes from polyvinyl chloride and would permanently preclude her from any employment requiring exposure to similar fumes or other lung irritants. This court held, "[b]ecause the uncontroverted medical testimony . . . is that petitioner's industrially-caused condition has permanently restricted her functional ability to return to work as a meat wrapper," petitioner had met her burden of proving permanent functional impairment and could proceed to a second hearing to determine whether her impairment caused a loss of earning capacity. *Id*. at 62, 633 P.2d at 1055. The Florida cases Crum cites are similar in that the disability was caused by an occupation-induced disease. *See Dayron Corp. v. Morehead*, 509 So.2d 930, 931 (Fla. 1987) (petitioner

developed acute contact dermatitis from coolant his employer had begun using; parties stipulated condition arose from employment); *OBS Co. v. Freeney*, 475 So.2d 947, 947 (Fla. App. 1985) (claimant developed contact dermatitis as a result of exposure to wet cement while working for employer).

¶11 In Crum's case, his work injury, the seizure, served to initiate an examination which exposed his underlying seizure tendency. Where the "evidence establishes a condition pre-existing the industrial injury, no worse after the industrial injury than before, and which is only coincidentally revealed by an investigation following the industrial injury," this court has found the employer not liable for the results of the investigation. *Makinson v. Indus. Comm'n*, 134 Ariz. 246, 250, 655 P.2d 366, 370 (App. 1982) (psychoneurosis preceded accident, neither triggered, aggravated nor otherwise caused by accident); *see also Ramonett v. Indus. Comm'n*, 27 Ariz. App. 728, 731, 558 P.2d 923, 926 (App. 1976) ("where the only role the industrial episode has played is to precipitate an investigation, the employer should not be liable for the results of what the investigation reveals").

¶12 Because Crum's working conditions aggravated his underlying condition, leading to his provoked seizure, the seizure itself was compensable. However, once that episode was resolved, Crum's condition was restored to the status quo ante. He continues to have an underlying seizure tendency, and it is this condition that requires Crum to take anti-seizure medication for several years, and also compels him to work fewer hours than before. No medical evidence was presented that Crum's underlying seizure tendency was causally related to his employment.[6] *See Simpson v. Indus.*

[6] Crum advances a causal chain argument similar to the petitioner in *Ramonett*, 27 Ariz. App. at 729, 558 P.2d at 924 (describing causal chain from minor accident leading to discovery of underlying condition of vasovagal bradycardia to loss of employment to disabling anxiety neurosis). He argues that "but for" the work-induced seizure, he would not have needed medication, and would not have lost his CDL and job. For his claim to be compensable, however, Crum must show an industrial episode

Comm'n, 189 Ariz. 340, 346, 942 P.2d 1172, 1178 (App. 1997) (claimant's burden to prove existence of industrially-related permanent impairment). Accordingly, although Crum's situation presents a compelling and sympathetic case, we are unable to say the ALJ committed any error of law, and we cannot deny that reasonable evidence supports a finding that, with the provoked seizure resolved, any further disability was not causally related to the employment-related injury.

Disposition

¶13 For the reasons stated above, the ALJ's award is affirmed.

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causing, triggering or contributing to his disability. *See Arellano*, 25 Ariz. App. at 603-04, 545 P.2d at 451-52 (petitioner must show "that the claimed permanent disability was in fact caused, 'triggered,' or contributed to by [the] industrial injury"). Crum's industrial injury, the seizure, was resolved. And no industrial episode caused or contributed to his seizure tendency, the condition resulting in his inability to drive commercially.